(2)

89-351

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

TOWNSHIP OF KENNEDY,

Petitioner,

vs.

KENVUE DEVELOPMENT, INC. and
KENVUE SERVICE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Counterstatement of Questions Presented

I. Whether denial of a Motion for Disqualification of Counsel is entitled to immediate review?

II. Whether due process required an evidentiary hearing before the decision not to disqualify Hollinshead and Mendelson as counsel for Kenvue Development, Inc. and Kenvue Services Company could be rendered?

III. Whether the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania recognized that the lower Court properly denied the Township's Motion and did not base its decision solely on the Doctrine of Laches?

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COUNTERSTATEMENT OF THE CASE

Procedural History

On November 6, 1978, Kenvue Development, Inc. and Kenvue Service Company filed a Petition for Appointment of Viewers to ascertain the just compensation due as a result of the *de facto* condemnation of their properties in the Township of Kennedy and a Board of Viewers was appointed. The Township of Kennedy ("Township") and the Kennedy Township Municipal Sewage Authority ("Authority")

filed Preliminary Objections, without Briefs, in late 1978. Counsel for Kenvue Development, Inc. and Kenvue Service Company filed a Petition for Evidentiary Hearing. On March 20, 1984, this case was assigned to the Honorable Maurice Louik. Those Preliminary Objections have not been decided and an Evidentiary Hearing was scheduled for July 28, 1987 before the Honorable Judge Louik.

On July 24, 1987, the Township of Kennedy filed a Motion to Disqualify the law firm of Hollinshead and Mendelson. On July 27, 1987, a Brief in Support was filed. This Motion was joined by the Kennedy Township Municipal Sewage Authority by filing a Memorandum of Law in support of the Township's Motion on August 3, 1987. Counter-Motions to Disqualify and Briefs were filed on behalf of Kenvue Development, Inc., and Kenvue Service Company. As a result, no evidentiary hearing was held on July 27, 1987. This case was reassigned to the Honorable Raymond L. Scheib by Order of August 3, 1987, and a Conciliation Conference was held on the matter.

By Order dated July 12, 1988, Judge Scheib denied all Motions for Disqualification. In response to the Township's Petition for Permission to Appeal an Interlocutory Order, Judge Scheib entered an order dated August 23, 1988 that the Interlocutory Order of July 12, 1988 involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of this case. The Township's Petition for Permission to Appeal to the Commonwealth Court of Pennsylvania was denied *per curiam* on October 13, 1988. The Township's subsequent Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on May 30, 1989. This Petition for Writ of Certiorari follows.

Factual History

Contrary to the statement of the case set forth by Kennedy Township, the action of Kenvue Development, Inc. and Kenvue Service Company for just compensation did not arise as a result of a Department of Environmental Resources order, but as a result of the actions of Kennedy Township and the Authority. In 1965, Kenvue Development, Inc. acquired a large tract of undeveloped farm land in Kennedy Township which stretches several thousand feet from a paved road near the crest of a hill down a hillside to a valley and an unnamed tributary of Moon Run. Kenvue Development, Inc. began single-family home developments in successive phases, starting near the paved road and working down the hillside. The first phase, Kenvue Plan of Lots No. 1, included 25 lots starting near the paved road. To service those lots, Kenvue Development, Inc. constructed a private sewage system completed in December 1971. This system, constructed outside of Kenvue Plan of Lots No. 1, was comprised of a long trunk line running down the hillside several thousand feet and a complete sewage system of trunk lines, manholes, storage tanks, filtration plant, settlement pond and chemical treatment station constructed at the bottom of the hillside near the stream. The sewer line, along with its treatment facilities, was laid across Kenvue Development, Inc. property outside the subdivision plans.

The Township of Kennedy applied to the Department of Environmental Resources for a sewage permit for this sewage treatment plant, and Permit No. 0271441 was issued on September 27, 1971, so that the facility could be placed into operation by Kenvue Service Company.

Kenvue Service Company was organized in 1972 and is the owner of sanitary sewer rights-of-way, storm drainage rights-of-way, sewer pipes, manholes, a sewage treatment plant and tanks and appurtenances located on the land owned by Kenvue Development, Inc. Kenvue Service Company also had a Certificate of Public Convenience, issued on December 13, 1972 by the Pennsylvania Public Utility Commission, allowing it to operate a sanitary sewer service.

On November 12, 1971, the Township adopted the Allegheny County Comprehensive Sewage Needs Plan 1970-2000 in order to provide sewage treatement to a large part of the Township. The Authority obtained a Department of Environmental Resources permit, No. 0272427, issued on June 11, 1973, to construct a municipal sewer system.

L. Robert Kimball, Consultant Engineers, engaged by the Authority, incorporated Kenvue Development, Inc. and Kenvue Service Company's privately owned trunk line into the design of the Kennedy Township municipal sewer system, interconnecting a section of the municipal system with the private system. This was to allow sewage effluent from nearby areas of the Township outside the Kenvue plans to enter into and pass through the private system to reach a new ALCOSAN intercepter line constructed in the stream valley.

In December 1975, the Authority's contractor entered into Kenvue Development, Inc. and Kenvue Service Company's property and drilled a hole into a manhole, connecting the municipal sewage system with the private sewage system. After protest, the contractor disconnected the municipal system from the private system. However, on March 31, 1976, the Authority's contractor again entered the property and, at a different

manhole, connected the municipal system to the private system. Kenvue Development, Inc. and Kenvue Service Company again protested and the contractor again disconnected the system.

On December 9, 1976, the Authority adopted Resolution 4-76 which authorized condemnation of sewer lines, storm drainage lines, manholes and treatment facilities owned by the Kenvue Service Company and provided for connection of the municipal system to the private system. The Resolution also authorized condemnation of certain land to provide a right-of-way enabling the Authority to connect to Kenvue Service Company's manholes. To acquire those necesary easement rights near the top of the hillside, on January 3, 1977, the Authority filed an eminent domain proceeding at No. GD77-0002 against Kenvue Development, Inc. and Kenvue Service Company and others.

Following the filing of Preliminary Objections at No. GD77-0002, the parties entered into a stipulation that no physical connection would be made by the condemnor and no sewage would flow into the facilities of Kenvue Service Company, including but not limited to lines, manholes and sewage disposal plant, and specifically into manholes behind Lots 16 and 22 in the Kenvue Acres Plan No. 1. Further, the stipulation provided that the condemnation was not intended to condemn any interest of Kenvue Service Company in its sewage disposal system, including but not limited to lines, manholes and sewage disposal plant.

On March 24, 1977, the Township enacted Ordinance No. 178 establishing Sewer District No. 6 of the Township of Kennedy and, *inter alia*, empowering the Commissioners and Township officers to take all steps

and incur the necessary expenses to negotiate with "... both private and public companies or corporations, for the furnishing of and supplying of sewage transportation and collection to the said sewer district and the acquisition of any sewer lines contained within the said sewer district ..." and to provide all money as is or may be necessary to finance the project, "and if need be, to borrow such funds to be expended in said sewer district ...".

Ordinance No. 179, adopted by the Township on April 12, 1977, empowered the Township to do all necessary to acquire the sewage system within Sewer District No. 6, including entering into agreements with owners of property and recording any agreements with those owners of property.

Pursuant to this ordinance, the Township announced and convened a meeting of lot owners in the Kenvue Plan. The meeting was held June 22, 1977. However, certain officers of Kenvue Development, Inc. and Kenvue Service Company, who were record owners of a lot, and the resident son of one of the officers, were refused admission to the meeting of lot owners. The Township posted a guard at the entrance for the purpose of keeping them away while the meeting was conducted. At the meeting, the Township, the Board and the individual Board members advised the lot owners that the Township intended to acquire the sewage system owned and operated by Kenvue Service Company and further advised that this would be done without compensating Kenvue Service Company or Kenvue Development, Inc. for said acquisition. The Township also advised the lot owners that, unless they cooperated in the plan, the full cost of acquisition by purchase or eminent domain would have to be borne by the lot owners. The lot owners were

told that the sewer system could lawfully be acquired without compensating the owner; that the property of Kenvue Development, Inc., which surrounds the sewage system could lawfully be trespassed upon without incurring legal liability; that unless more than 50% of the lot owners served by Kenvue Service Company agreed to cooperate in acquisition under the provisions of the First Class Township Code, 53 P.S. §57415(e)(1), the entire cost of acquisition by eminent domain would be assessed against the lot owners and that, as a result, each lot owner would be required to pay an assessment in excess of $2,000; that the Township had offered to pay a purchase price of $33,000 for the sewage system and that the offer had been rejected; and that, if the lot owners did not cooperate in the plan, the sewage system would be ordered to close and the Township would cause the permit issued by the Department of Environmental Resources to be revoked, thereby depriving the lot owners of sanitary sewage service. The Township further advised those in attendance at the meeting that, within three weeks, a physical connection would be made between the Authority's sewage system and that of Kenvue Service Company.

After the meeting of June 22, 1977, the Township and the Authority prepared and mailed to each of the lot owners agreements which obligated the lot owners to cooperate in the plan to acquire the Kenvue Service Company sewage system and to trespass upon the property of Kenvue Development, Inc.

Thereafter, the Township approached the D.E.R. and requested that the sewage permit, which allowed Kenvue Service Company to operate, be cancelled. At the request of the Township, and without the consent of either Kenvue Development, Inc. or Kenvue Service Company,

the Department of Environmental Resources cancelled Permit No. 0271441, effective September 29, 1978. The Department of Environmental Resources, by an order dated August 17, 1978, required the "interconnection of the Kenvue Manor Plan sewers with the municipal sewer system . . . [by] no later than September 22, 1978", and further ordered that Kenvue Service's sewage treatment plant should be abandoned and an abandonment plan submitted to the Department of Environmental Resources by September 15, 1978. Kenvue Development, Inc., and Kenvue Service Company opposed the cancellation of the sewage permit, seeking a stay of the Order before the Environmental Hearing Board and Injunctive Relief in the Commonwealth Court of Pennsylvania. This opposition was unsuccessful.

The Order of the Department of Environmental Resources, however, does not prevent compensation to the petitioners for the taking of their property. In its transmittal letter accompanying the order, the Department of Environmental Resources explicitly states, "[n]othing in the order shall be construed to establish or modify the rights of any party with regard to any compensation for the value of the plant abandoned pursuant to the order". The Order itself further directs that the parties "initiate negotiations to provide for the interconnection" of the two systems. No such "negotiations" took place and, instead, the Township and the Authority took it upon themselves to effect the interconnection.

On September 27, 1978, the Township entered onto petitioners' property and completed physical connection of the Township's municipal sewer system into the private sewer system. By doing so, the Township circumvented the stipulation in the condemnation action

at No. GD77-00002. No Declaration of Taking was filed nor has just compensation been paid to Kenvue Development, Inc. or Kenvue Service Company.

After Kenvue Development, Inc. and Kenvue Service Company failed in their efforts to prevent the taking of their property, only one avenue remained open—an action seeking just compensation. This action was thus filed on their behalf by Hollinshead and Mendelson—the lawyers who had represented them in all of their previous efforts.

At the time that the Township sought the cancellation of sewage permit No. 0271441 and Kenvue Development, Inc., and Kenvue Service Company opposed cancellation, Richard S. Ehmann was Senior Litigator for the D.E.R. He was involved in the issuance of the cancellation Order and represented the D.E.R. before the Environmental Hearing Board and the Commonwealth Court of Pennsylvania. On January 2, 1986, Richard Ehmann left his position with the Department of Environmental Resources and joined the law firm of Hollinshead and Mendelson. An announcement of this new position was sent to counsel for the Township of Kennedy. On the eve of hearing, roughly 17 months after receiving notice that Richard Ehmann had joined the law firm of Hollinshead and Mendelson, the Township of Kennedy filed its Motion to Disqualify.

Summary of Argument

The interlocutory Order in question denying Petitioner's Motion for Disqualification of Counsel was not "final" and therefore was not entitled to immediate review. The Order, though granted without a hearing, did not violate due process when such hearing was neither necessary nor requested by Petitioner. Finally, Petitioner's Motion for Disqualification was properly denied when Petitioner waited 17 months for a strategically timely moment to file such motion, and when the prejudice to Respondents that disqualification of counsel would cause would heavily outweigh the unrealistic allegations of judicial unfairness raised by Petitioner.

REASONS FOR DENYING THE WRIT

I. Denial of a Motion for Disqualification of Counsel is not entitled to immediate review.

Under our appellate system, one has the right to appeal an order which is "final". *Cohen v. Beneficial Industries Loan Corp.*, 337 U.S. 541 (1949), adopted by the Supreme Court of Pennsylvania in *Bell v. Beneficial Consumer Discount Company*, 465 Pa. 225, 348 A.2d 734 (1975). However, the denial of a disqualification motion is a *not* final order. *Middleberg v. Middleberg*, 427 Pa. 114, 233 A.3d 889 (1967). In issuing its order denying the Petition for Permission to Appeal, the Commonwealth Court of Pennsylvania followed well established Pennsylvania precedent. There is no discrepancy in the way the Pennsylvania appellate courts handle orders refusing to disqualify counsel.

Two panels of the Superior Court of Pennsylvania grappled with the question of whether the adoption of the *Cohen* standard by *Bell* signified a change in Pennsylvania law as it related to disqualification and ultimately concluded that it did not. In both *Flood v. Bell*, 287 Pa. Super. 515, 430 A.2d 1171 (1981) and *Pittsburgh & New England Trucking Co. v. Reserve Insurance Co.*, 277 Pa. Super. 215, 419 A.2d 738 (1980), the Superior Court held that a trial court order refusing to disqualify counsel was interlocutory and unappealable in that such order did not preclude the parties seeking disqualification from proceeding with the actions in court. As it relates to federal litigation, the United States Supreme Court has resolved this question by concluding that the denial of a motion to disqualify is unappealable until final judgment of the underlying litigation. *Firestone Tire and Rubber Company v.*

Risjord, 449 U.S. 368 (1981). The Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania in this case have followed controlling law in deciding the Petition for Permission to Appeal.

The logic behind these decisions is clear as the denial of a motion to disqualify does not put a party out of court. In adopting the *Cohen* standard in *Bell*, the Supreme Court of Pennsylvania was sensitive to the same logic because members of a class were "put out of court" by dismissal of the class aspects of the underlying litigation.

The focus of any question of appealability is on whether or not the order in question precludes the party from proceeding with the action. In this matter, the Township is not precluded from going on with this action. The Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania properly recognized this and properly denied the Township's Petitions. Likewise, this Petition for Writ of Certiorari should be denied.

II. The Court did not deny due process by rendering its decision not to disqualify Hollinshead and Mendelson as counsel for Kenvue Development, Inc. and Kenvue Services Company without an evidentiary hearing.

The constitutional guaranty of due process declares that the government shall not deprive any person of life, liberty, or property without due process of law. It is beyond dispute that, in order to satisfy due process requirements, one must have notice and opportunity to be heard. Before due process is required, however, one must have a protected interest which is threatened. In this matter, the Township has no protected interest and is not entitled to due process protection. The Township claims that its interest is "fairness in judicial proceedings." Following this argument, the Township must believe that fairness can be taken away so long as the due process requirements of notice and opportunity to be heard are given. This cannot be and the Township cannot credibly advance such an argument.

Certainly, "fairness in judicial proceedings" is an important interest and one we all hold dear, but due process does nothing to protect this interest. Nor are due process requirements designed to protect this interest. Fairness is protected by mechanisms such as evidentiary and procedural rules, impartiality of judges and open access to the courts. Due process protects other interests which fall within the ambit of life, liberty and property and does not impact on this matter in anyway whatsoever.

The Township suggests that it was entitled to an evidentiary hearing to show the prejudice it would suffer if Hollinshead and Mendelson continues its representation of Kenvue Development, Inc. and Kenvue Service Company. Even if due process protection were to

be accorded in this instance, it is well settled that due process does not require a hearing in every conceivable case. *See, e.g.*, 16A Am. Jur. 2d, Constitutional Law, §845 and the cases cited therein. *See also, Pennsylvania Coal Mining Assn. v. Insurance Department*, 471 Pa. 437, 370 A.2d 685 (1977). Further, the Township never requested such a hearing. Procedurally, the Township waived its right to an evidentiary hearing when it chose to proceed by motion rather than by verified petition, which would have placed disputed factual matters before the court. It was satisfied to present its motion, replete with unverified allegations of fact and wait for a decision of the Court. Only when the decision was adverse, nearly one year after the motion was filed, was the Township heard to cry that its due process rights were violated. As both the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania denied the Petitions for Permission to Appeal in accordance with past decisions of the Pennsylvania Courts on this due process issue, the Township's instant Petition for Writ of Certiorari should also be denied.

III. The Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania recognized that the lower Court properly denied the Township's Motion and did not base its decision solely on the Doctrine of Laches.

The Township claims that its Motion was denied as barred by the Doctrine of Laches, that the Pennsylvania appellate courts acquiesced in an improper application of this doctrine and that this gives rise to a special and important reason to allow its appeal. The Township, however, fails to understand the trial court decision rendered by the Honorable Raymond L. Scheib. Contrary to the Township's interpretation of the Judge's opinion, Judge Scheib did not deny the Township's motion on the ground that it was barred by the Doctrine of Laches. Judge Scheib considered the Township's claims that Disciplinary Rules were violated, and found the claims to be unsupported. He also balanced those claims against the interests of Kenvue Development, Inc. and Kenvue Service Company and found that an extraordinary hardship would be visited upon them if their counsel were to be disqualified at this time. (Appendix to Petition for Writ of Certiorari, 6a). These considerations are in accordance with the law and the decision of Judge Scheib was a proper exercise of his discretion. *See, e.g., Freeman v. Kulicke and Soffa Industries,* 449 F. Supp. 974 (E.D. Pa. 1978), *aff'd* 591 F.2d 1334 (3d Cir. 1979); *American Dredging Co. v. Philadelphia,* 480 Pa. 177, 389 A.2d 568, 572 (1978) (competing interests of a party's choice of counsel and ethical administration of justice must be recognized); *Kramer v. Scientific Control,* 534 F.2d 185 (3d Cir. 1976) (hardship upon the party whose counsel would be disqualified is an important factor).

In his opinion, Judge Scheib noted that the Township knew of Mr. Ehmann's position with Hollinshead and Mendelson for 17 months but failed to question it. This unreasonable delay in bringing its Motion, was unexplained. (Appendix to Petition for Writ of Certiorari, 7a). Judge Scheib was cognizant of the warning of *Freeman*, that when a judge is faced with a Motion to Disqualify brought very late—with no explanation for the delay—tactical considerations may be a motivating force in bringing the motion. (Appendix to Petition for Writ of Certiorari, 7a).

When the Township stood by for 17 months while counsel for Kenvue Development, Inc., continued to prosecute this litigation and then, a mere *three* days before scheduled evidentiary hearing, raised a Motion to Disqualify, a question of motivation must arise. The Township's delay evinces a motive that is less concerned about enforcing the Code of Professional Responsibility than it is in gaining a tactical advantage.

The true import of Judge Scheib's decision was that the Township of Kennedy had not met the burden imposed on a party seeking the disqualification of its opponent's counsel. (Appendix to Petition for Writ of Certiorari, 7a). The party seeking disqualification "has the burden of establishing that counsel's continuing in the case would violate the disciplinary rules". *Zions First National Bank v. United Health Clubs*, 505 F. Supp. 183, 140 (E.D. Pa. 1981). Judge Scheib relied upon *Freeman, supra*, for the principle that "[v]ague assertions of prejudice will not serve to disqualify .... The prejudice that Ehmann's testimony would produce must be demonstrated, but Kennedy Township has failed to do so." (Appendix to Petition for Writ of Certiorari, 7a).

The Township of Kennedy alleged that to allow Hollinshead and Mendelson to continue to represent Kenvue Development, Inc., and Kenvue Service Company violates Disciplinary Rule 5-101(B). In support of this position, the Township quoted D.R. 5-101(B).

> A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness.

The Township, however, quoted only as much of the Rule as is favorable to its argument. The entire, accurate quote of DR 5-101(B) is:

> (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:
>
> (1) If the testimony will relate solely to an uncontested matter.
>
> (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
>
> (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.
>
> (4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Mr. Ehmann's potential testimony, which is wholly unnecessary, meets each of the relevant standards set forth in DR 5-101(B). (1) The testimony would relate to an uncontested matter (2) which is solely a formality and

no evidence will be offered in opposition. In their Petition for Appointment of Viewers, Kenvue Development, Inc., and Kenvue Service Company acknowledge the order of the D.E.R. and do not question the department's authority. The Township is seeking to rely on this order for the justification of taking without payment of just compensation. But the only question potentially before the lower Court is an interpretation of the plain language of the order—and that question is to be answered by a reading of the order. There is no need for testimony at all.

DR 5-101(B): (4) allows a lawyer to undertake employment and testify "[*A*]*s to any matter,* if the refusal would work a substantial hardship on the client because of the distinctive value . . . of his firm as counsel in that particular case". In this case, Hollinshead and Mendelson has represented the Petitioners on this matter for more than 15 years. The hardship on the client to now, on the eve of trial, seek new counsel would be extraordinary.

The Township of Kennedy further alleges a violation of Disciplinary Rule 9-101(B) which provides:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Mr. Ehmann did not accept employment in a matter in which he had "substantial responsibility". The matter of whether the Petitioners in the lower Court have the right to just compensation has no relationship whatsoever to the matter for which Mr. Ehmann had responsibility.

Mr. Ehmann, in his role at the D.E.R., participated in the cancellation of a sewage permit and the defense of that cancellation. At issue in this case is the amount of

compensation due as a result of the taking of Petitioners' property. Mr. Ehmann never had substantial, or any, responsibility in this matter. The issuance of a permit cancellation order, and most particularly the order at issue in this case, does not relate to the payment of just compensation. The Township of Kennedy cannot credibly seek to justify its taking of property *without the payment of just compensation* upon the order of the Department of Environmental Resources and cannot credibly seek to have the law firm which has represented the property owners for over 15 years disqualified based on the involvement of one employee of the law firm in his former role as a government attorney.

Further, Mr. Ehmann, since joining Hollinshead and Mendelson, had absolutely no involvement in the instant litigation. On these facts, there is no violation of Disciplinary Rule 9-101(B).

A clear reading of Judge Scheib's opinion concerning his Order of July 12, 1988 denying the Township's Motion for Disqualification shows no abuse of discretion. A review of the reasoning and cases cited by Judge Scheib further demonstrates that there is no substantial ground for difference of opinion. The Commonwealth Court of Pennsylvania acknowledged that an immediate appeal from the Order would not materially advance the ultimate termination of the case and denied the Township's Petition. The Motion to Disqualify, the Petition for Permission to Appeal to the Commonwealth Court of Pennsylvania, the Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, and now this Petition for Writ of Certiorari, are merely more delays in getting to the merits of this action, and only serve to unconscionably postpone the payment of just compensation to Kenvue Development, Inc. and Kenvue Service Company.

Conclusion

The Interlocutory Order denying the Motion to Disqualify Hollinshead and Mendelson does not satisfy the criteria established to justify an immediate appeal, thus the Supreme Court of Pennsylvania and the Commonwealth Court of Pennsylvania properly denied Kennedy Township's Petitions for Permission to Appeal. There are no special or important reasons to allow an appeal from those Orders and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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